Filed 4/6/09 Marriage of Palacio CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of COLLETTE M. and EMILE PALACIO.	
COLLETTE M. PALACIO, Appellant, v. EMILE PALACIO, Respondent.	E044738 (Super.Ct.No. SBFSS69322) OPINION

APPEAL from the Superior Court of San Bernardino County. Duke D. Rouse, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Gregory T. Annigian for Appellant.

Emile Palacio, in pro. per., for Respondent.

Appellant Collette M. Palacio (mother) and respondent Emile Palacio (father) are the parents of a minor child. The family law court made orders concerning custody, visitation, child support and additional child support in the form of childcare or daycare expenses, half to be paid by each parent. The court denied mother's request for payment of an alleged arrearage on the childcare expenses. She appeals that denial. We reverse.

FACTS AND PROCEDURAL HISTORY

In April 2003, mother filed an order to show cause (OSC) on custody, visitation and support issues. Mother filed an income and expense declaration. The court ordered the parties to mediation with family court services. The court apparently received a report from a family court services mediator; the court made temporary orders pending entry of a final judgment. Among other things, the court ordered no change in the child's daily care arrangements. Father was ordered to bring a letter from the child's preschool indicating whether the child was accepted into the program, the preschool opening and closing hours, and the amount of tuition. The court deferred making a support order until the letter was received, but the support eventually ordered would be retroactive to the date of the OSC hearing, April 16, 2003. The court intended the support order to include an order that each parent pay half of the child's daycare or childcare expense.

The requested letter from the preschool was apparently filed on June 10, 2003. On June 11, 2003, the court found that both parents were employed in the Los Angeles area, and thus ordered that the child would attend the preschool designated in the letter. The parties were each ordered to pay half the tuition and childcare expense. The court

indicated it would reconsider the daycare plan, however, if mother transferred her employment to the "Inland area."

Mother filed a second OSC concerning modification of visitation and attorney fees, and to clarify the court's earlier order of June 11, 2003. The court ordered that the visitation orders of June 4 were to be the only orders in effect unless and until the parties could agree on a new visitation arrangement. The shared custody plan in effect would be the proportion used to calculate support. Because father's income and expense declaration was missing a page, the court ordered that mother's attorney be able to subpoena father's records. Any wage assignment imposed by the court would be for support, and not for any past-due childcare payments. Father was ordered to pay $415 per month in child support, plus half of the childcare expense. Any support arrears were to be paid at a rate of $150 per month. Mother was ordered to submit a record of existing arrears for childcare to her attorney, and forwarded to father's attorney with copies of the bills. The court intended to make an order that father pay arrears for past-due childcare expense at $50 per month.

On September 3, 2003, the court took the issues of visitation and preschool placement under submission. Father failed to appear at the hearing; the record also reflected that father had been referred to family court services twice to resolve such issues, and had failed to appear both times. Father eventually appeared for settlement conference, and the parties presented argument. Since the hearing in July, mother had indeed moved from the Los Angeles area; the court found that the child's interests were

better served by placement in a preschool near mother's home in Fontana, rather than the preschool in Los Angeles. Father was granted visitation on alternate weekends, with the parents making the exchange at a halfway point between their homes.

An order to pay child support by wage assignment went into effect in approximately October of 2003.

Judgment of dissolution of marriage was entered on September 15, 2005. The judgment reaffirmed the earlier orders, i.e., that father had visitation on alternate weekends with the exchange being made at a halfway point, and the child attending school or preschool in Fontana. The support order was also confirmed, ordering father to pay $415 per month, beginning April 16, 2003, payable by wage assignment. Father was also to pay half of the childcare expenses as additional support.

An OSC for modification of visitation and support came on for hearing in January 2006. Father pointed out that, although the child had attended full-time daycare when she was preschool age, she had begun attending kindergarten at age four. Father complained that he was paying half the cost of private kindergarten, when the child could attend public school. He argued, therefore, that he should only be liable for half the cost of non-school care, rather than full-time school.

At the conclusion of the hearing, father was awarded additional summer visitation for all of July and two weeks of August. The court ordered father to pay $488 per month in child support, payable by wage assignment. He was also ordered to pay half the daycare costs, which he could pay directly to the daycare provider. The daycare

payments were not subject to wage assignment, but the court ordered that wage assignment could be imposed if father was more than 10 days late on any daycare payment. Mother's counsel was ordered to file records of the cost of daycare and the cost of the child's school for 2004. Counsel was also ordered to submit an itemized claim for attorney fees.

Mother's counsel submitted a declaration and documents in April 2006, showing that the child attended private kindergarten from September 2004 through August 2005. The tuition rate for kindergarten was $160 per week, but the rate for before- and after-school care with the child's current daycare provider was the same rate, $160 per week, including delivery to and pick up from public school. The current rate for first grade was $129 per week, because the child spent more time at school, and less time in daycare. In June 2006, the daycare rate went up from $129 per week to $174 per week. In August 2006, the child's public school began providing before- and after-school care at a rate of $355 per month.

Father had begun paying the daycare provider directly for his half of the expenses, but there was some dispute about how much he had paid, when he had begun paying, and a missing payment of $154.

In February 2007, the court modified the support orders, ordering father to pay child support of $498 each month, plus half the childcare expenses.

The parties were unable to resolve their ongoing disputes about the amount of arrearages owed on past-due child support and past-due childcare expense. At a hearing

in July 2007, father acknowledged that the only amounts he had paid for child support had been taken from his paycheck by wage assignment, starting in August 2003.

The court made a ruling on the support and arrearages in October 2007. The court found that the wage assignment had actually gone into effect in October 2003. Father made no other payments for current child support or child support arrearages. The actual amount taken from father's wages was sufficient to cover the ordered $415 per month child support, but insufficient to pay the $150 on arrearages that had been ordered. The arrearage was also slightly larger than originally calculated, because of the delay in implementing the wage assignment payments.

The court calculated the child support payments father had made, taking account of the modifications of support that had been made from time to time, and concluded that father owed $994.03 as of the end of November 2006, but no evidence of payments made after the modification of December 1, 2006, had been included.

As to the childcare expense, the court noted that "[t]he first order of July 29, 2003, required [mother] to submit records of alleged arrearages on child care," but there was "no evidence presented by [mother] that this order was ever complied with."

The childcare issue came up again at the hearing in January 2006, when the court ordered mother to "submit records of day care costs for 2004. Thereafter the court received a letter and statement regarding tuition and pre-school costs but no documents regarding day care. Further, [mother] has provided no evidence that she ever complied with the requirements of Family Code § 4063(b) regarding the collection of child care

expenses." The court found that the first time father had any knowledge of the daycare expense was an accounting for the period December 30, 2005, through May 23, 2006. Beginning on February 3, 2006, father began paying the childcare provider directly. The court again remarked that there was "no evidence [mother] complied with Family Code § 4063(b) prior to that date. [¶] The court finds there is no enforceable arrearages on child care prior to February 3, 2006."

The court also awarded mother attorney fees of $1,000.

Mother appeals this ruling, on the ground that the court erred in denying payment for childcare expenses before February 2006.

ANALYSIS

I. Standard of Review

An order granting or denying a request for modification of a child support order is reviewed for abuse of discretion. (*Brothers v. Kern* (2007) 154 Cal.App.4th 126, 133.) Here, mother sought enforcement rather than modification of the support order. Although the basic determination of child support is regulated by statutory guidelines, the court does have some discretion in setting reasonable amounts for child support. (Cf. *In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1359.)

"The trial court's exercise of its discretion must be 'informed and considered' [citations], and the trial court may not 'ignore or contravene the purposes of the law' [citation]." (*Plumas County Child Support Services v. Rodriguez* (2008) 161 Cal.App.4th 1021, 1026.)

The court's factual findings are reviewed for substantial evidence. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1151.) The interpretation of statutes is, however, a matter for the reviewing court. "[W]hen a trial court's ruling turns on the interpretation of a statute, the issue is one of law, subject to the independent review of the appellate court. [Citation.]" (*County of Yuba v. Savedra* (2000) 78 Cal.App.4th 1311, 1316.)

II. Family Code Section 4063, Subdivision (b), Is Inapplicable

In addition to guideline child support, Family Code section 4062 provides for certain additional support amounts. Mandatory additional child support consists of childcare costs related to employment or reasonably necessary education or training for employment skills, and to reasonable uninsured healthcare costs for the children. Discretionary additional child support may be ordered for costs related to the educational or other special needs of the children, or for travel expenses for visitation. (Fam. Code, § 4062.) Here, the evidence showed that both parents worked outside the home. Some kind of childcare was necessary to enable mother to work. The additional child support was for work-related childcare, or possibly for educational needs expense, not for uninsured healthcare.

Family Code section 4063 prescribes procedures applicable to reimbursement of uninsured healthcare costs. Family Code section 4063, subdivision (b), provides in pertinent part that, "[u]nless there has been an assignment of rights . . . when either parent accrues or pays costs pursuant to an order under this section, that parent shall provide the

other parent with an itemized statement of the costs within a reasonable time, but not more than 30 days after accruing the costs."

The trial court faulted mother for failure to submit an itemized statement of childcare costs, citing Family Code section 4063, subdivision (b). Mother's asserted failure to comply with the order for an itemized statement was not, however, proper grounds for denying enforcement of childcare arrearages. First, even where Family Code section 4063 is applicable—i.e., to uninsured healthcare costs—the failure to submit an itemized statement within 30 days does not excuse payment of the expense. "[S]ection 4063 does not prohibit a party from seeking reimbursement in case of a failure to timely present an itemization of costs. Rather, section 4063, subdivision (c) allows the court to award filing costs and reasonable attorney fees 'if it finds that either party acted without reasonable cause.'" (*In re Marriage of Rothrock* (2008) 159 Cal.App.4th 223, 236-237.) Second, the itemization requirement of Family Code section 4063 applies solely to reimbursement of uninsured healthcare costs, not to childcare. In *In re Marriage of Tavares* (2007) 151 Cal.App.4th 620, the father argued that "each parent should provide the other with an itemized statement of childcare costs, similar to the procedure the Legislature has established for reimbursement of uninsured healthcare costs. (§ 4063, subd. (b).)" The court soundly rejected this suggestion: "Father mistakes his forum. The Legislature declares state public policy, not the courts. [Citation.] The Legislature has determined that equity favors preserving the option of childcare payments made to the other parent rather than directly to the provider and that, when so ordered, the

convenience and certainty of a fixed amount outweigh any benefits of an accounting or itemized statement whenever the child is not in daycare or costs fluctuate." (*Id*. at p. 628.)

Although the court here did eventually permit father to pay the daycare provider directly for his share of ongoing childcare costs, father only did so beginning in February 2006. The previously ordered payment of half the childcare expenses still remained unpaid. The trial court abused its discretion in, effectively, penalizing mother for failure to deliver an itemized statement to father. Contrary to the court's ruling, no such itemization was required and, even if it had been required, it was not a bar to the claim for reimbursement.

III. The Trial Court Abused Its Discretion in Failing to Calculate and Order Payment for Childcare Arrearages

On June 11, 2003, the court had ordered each party to pay half the child's tuition or daycare expenses, retroactive to April 16, 2003. At the time, both parties were living in the Los Angeles area, but the court reserved the right to alter the orders if mother moved.

On July 29, 2003, the court established the first child support order of $419 per month, and at that time ordered mother to "submit a record of existing arrears for childcare to her [attorney]. That document is to be forwarded to [father's attorney] with [copies] of the bills. Court will make an order for [father] to reimburse [mother] for past due childcare at $50 per month." Apparently, this was the ordered itemization under

Family Code section 4063 to which the court later referred in its ruling denying childcare arrearages. The court in 2007 found that mother had presented no evidence that she ever complied with the order to supply an itemization of the childcare bills.

At the hearing on January 31, 2006, the court again indicated that mother was to "submit records on the day care cost and school cost for 2004." Mother's counsel responded with a declaration and letter to show that the child's school care cost for the 2004-2005 year was $160 per week. At the hearing, father had objected to paying for "tuition" for the child to be in a private school during the 2004-2005 year. He argued that the child should have attended public school kindergarten. Mother's supporting declaration, and a letter from the childcare provider, showed that the cost for before- and after-school care was also $160 per week, the same amount that had been charged for attendance at the private school kindergarten. Thus, the charges were, or would have been, the same, whether the child attended public or private school. The child began attending public school in September 2005. The rate for before- and after-school care for the 2005-2006 school year was $129 per week.

Father began paying the daycare provider directly for his half of the monthly expenses on February 3, 2006. The trial court's finding that there were no enforceable childcare arrearages before that date was unsupported by the evidence, which showed that childcare was $160 per week from September 2004 through August 2005, and $129 per week from September 2005 through February 3, 2006. The evidence also showed that the child was enrolled in a preschool in Los Angeles from April 2003 until

September 2003, when the court ordered the child's preschool changed to Fontana, closer to mother's home. The register of actions shows that, at a hearing on June 4, 2003, the court ordered father to bring a letter from the child's preschool in Los Angeles, "stating [whether the] school would accept the minor child back, what time school opens & closes and the tuition amount." Father apparently brought in such a letter, as the minutes of June 11, 2003, recite that the court "has received and read the documentation re the childcare center in Los Angeles." The court therefore ordered that the child attend the Los Angeles preschool, and further that "[e]ach party is to pay 1/2 of tuition and childcare expense. This order will continue until further order of the court. [Mother] previously indicated her employment may transfer to Inland area. Court will reconsider the daycare plan if [mother's] employment changes to this area." In accordance with that plan, in September 2003, the court did order the child placed in a preschool in Fontana after mother had moved. The order requiring each party to pay half the childcare expense was never altered, however. There was evidently evidence before the court concerning the cost of the child's preschool, from April 2003 to September 2003, when the child was enrolled in a preschool closer to mother's new home. There was evidence in the record that the cost of the child's private kindergarten, in the 2004-2005 school year, was the same as the cost of any before- and after-school care that would have been required had the child attended public school. There was evidence before the court concerning the cost of the child's before- and after-school care from September 2005 to February 3, 2006. The court abused its discretion in failing to calculate this arrearage and to order

father to pay his half of this expense to reimburse mother. Additional support in the form of required childcare had been ordered from and after April 16, 2003; the trial court abused its discretion in failing to enforce this order.

DISPOSITION

The trial court abused its discretion in failing to enforce the outstanding order that father pay half the child's tuition and daycare costs on and after April 16, 2003. The evidence did not support the court's finding that there was no enforceable arrearage, inasmuch as evidence was presented to the court concerning the costs for at least April through September 2003, September 2004 through August 2005, and September 2005 through February 2006. In addition, the court erred in finding no enforceable arrearage based on the alleged failure of mother to comply with Family Code section 4063, subdivision (b). That provision was wholly inapplicable and, in any event, the failure to provide an itemized statement is not a bar to enforcement of a reimbursement claim.

The trial court is directed to vacate its order finding no enforceable arrearage, to calculate appropriate arrears, and to award mother reimbursement for half of those expenses, as well as to make any other appropriate enforcement orders.

Costs on appeal are awarded to appellant.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ Gaut
J.